Office-Supreme Court, U.S.
FILED
JUL 11 1985
ALEXANDER L. STEVAS,
CLERK

85-55

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LORRAINE POLASKI, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

WILLIAM KANTER
HOWARD S. SCHER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

23 pp

QUESTION PRESENTED

Whether, in this class action under 42 U.S.C. 405(g) challenging the weight the Secretary accords to a person's allegations of pain in determining whether he is entitled to disability benefits under the Social Security Act, the district court correctly included within the class numerous claimants who had not exhausted their administrative remedies and therefore had not obtained a "final decision" of the Secretary on their individual claims for benefits.

PARTIES TO THE PROCEEDINGS

The petitioner is the Secretary of Health and Human Services.

The named respondents are Lorraine Polaski and Patrick Blaschko. These two respondents are representatives of the following class certified by the district court (Pet. App. 51a-52a):

> All persons residing in Minnesota, North Dakota, South Dakota, Missouri, Nebraska, Iowa, or Arkansas,
>
> a) who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied or that their Title II and/or Title XVI benefits are being terminated on medical or medical vocational grounds; and
>
> b) who allege that they are unable to work in whole or in part because of pain or other subjective complaints and/or that their medical condition has not improved; and
>
> c) who are pursuing or will pursue timely administrative or judicial appeals, or, if not pursuing timely appeals, who have received or will receive an adverse decision at any level of the administrative review process on or after January 30, 1984, provided however that,
>
> > (1) as to those who are residents of Arkansas and who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied, the class includes only (a) those who are pursuing or will pursue timely judicial appeals and (b) those who are pursuing timely administrative appeals at the Administrative Law Judge or Appeals Council level, and (c) those who received or will receive an

adverse decision at the Administrative Law Judge or Appeals Council level on or after February 20, 1984;

(2) as to those who are residents of Arkansas and who have been terminated from Title II and/or Title XVI benefits, the class also includes those who have received or will receive an adverse decision at any level of the administrative review process on or after February 12, 1983; and

(3) as to those who are residents of Iowa and who have been or will be notified that their applications for Title II and/or Title XVI benefits have been denied, the class also includes those who have received an adverse decision at any level of the administrative review process on or after November 26, 1983; and

(4) as to those who are residents of Iowa and who have been or will be terminated from Title II and/or Title XVI benefits, the class also includes those who have received or will receive an adverse decision at any level of the administrative review process on or after January 13, 1982;

d) provided, further, however, that the class of persons whom plaintiffs represent shall exclude persons who are members of class actions which have been certified in any court in the Eighth Circuit which challenge the Secretary's policy with regard to a medical improvement standard or the evaluation of pain and other subjective complaints; provided that such persons shall be excluded from this class only with regard to the issue or issues actually being litigated in such other certified class actions.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	12
Conclusion	16

TABLE OF AUTHORITIES

Cases:

City of New York v. *Heckler*, 742 F.2d 729, petition for cert. pending, No. 84-1923 ..... 2-3, 10, 12, 13, 14, 16
Heckler v. *Kuehner*, No. 83-1593 (Nov. 5, 1984) 9, 15
Heckler v. *Lopez*, No. 84-115 (Dec. 10, 1984) 9
Heckler v. *Owens*, appeal docketed, No. 84-1905 (June 5, 1985) 12-13, 16
Heckler v. *Ringer*, No. 82-1772 (May 14, 1984) 12, 13
Hyatt v. *Heckler*, 757 F.2d 1455 12
Mathews v. *Eldridge*, 424 U.S. 319 ..... 3, 11, 12, 13
Weinberger v. *Salfi*, 422 U.S. 749 ..... 12, 14

Statutes and regulations:

Social Security Act, 42 U.S.C. 301 *et seq.*:
Title II, 42 U.S.C. 401 *et seq.*:
§ 205(g), 42 U.S.C. 405(g) ..... I, 2, 4, 5, 6, 7, 10, 12, 14, 15
§ 223(d)(1)(A), 42 U.S.C. 423(d)(1)(A) 3
§ 223(d)(3), 42 U.S.C. 423(d)(3) 3
Title XVI, 42 U.S.C. 1381 *et seq.*:
§ 1614(d)(3)(A), 42 U.S.C. 1382c(a)(3)(A) 3
§ 1614(a)(3)(C), 42 U.S.C. 1382c(a)(3)(C) 3

Statutes and regulations—Continued: Page

Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.*:
§ 2, 98 Stat. 1794 ..... 9, 10, 15
§ 3, 98 Stat. 1799 ..... 2, 10, 15
28 U.S.C. 1361 7
20 C.F.R.:
Section 404.1529 3
Section 416.929 3

In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

LORRAINE POLASKI, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 751 F.2d 943, and the July 17, 1984 order of the court of appeals approving the parties' settlement agreement as to one issue (Pet. App. 27a-31a) is reported at 739 F.2d 1320. The April 17, 1984 order of the district court certifying the plaintiffs' class and entering a temporary restraining order (Pet. App. 32a-45a) is reported at 585 F. Supp. 997, and the April 27, 1984 order of

the district court amending the class certification and entering a preliminary injunction (Pet. App. 46a-81a) is reported at 585 F. Supp. 1004.

JURISDICTION

The judgment of the court of appeals (Pet. App. 82a) was entered on December 31, 1984. The order denying the Secretary's petition for rehearing (*id.* at 83a) was entered on April 16, 1985, and an amended order was entered on April 19, 1985 (*id.* at 84a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), and Section 3 of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1799, are reproduced at Pet. App. 85a-89a.

STATEMENT

This is an Eighth Circuit-wide class action challenging the weight accorded by the Secretary of Health and Human Services to a claimant's allegations of pain in determining whether he is entitled to disability benefits under Title II or Title XVI of the Social Security Act. In this petition, we seek review of the court of appeals' requirement that the Secretary reopen decisions of thousands of applicants for disability benefits who did not exhaust their administrative remedies and obtain a "final decision" of the Secretary on their claims for benefits, which is a prerequisite to jurisdiction under 42 U.S.C. 405(g). This question concerning exhaustion of administrative remedies is similar to that presented in *Heckler*

v. *City of New York*, petition for cert. pending, No. 84-1923 (filed June 7, 1985).[1]

1. Under both Title II and Title XVI of the Social Security Act, the term "disability" is defined to mean the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" that can be expected to result in death or to last for 12 months. 42 U.S.C. 423(d)(1)(A) and 1382c(a)(3)(A). The impairment must be one that "results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. 423(d)(3) and 1382c(a)(3)(C). See *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976).

Implementing regulations provide that a claimant will not be found to be disabled under these statutory standards on the basis of his symptoms, including pain, "unless medical signs or findings show that there is a medical condition that could be reasonably expected to produce those symptoms." 20 C.F.R. 404.1529, 416.929. In Social Security Ruling (SSR) 82-58, the Social Security Administration (SSA) explained that the decisionmaker must consider the impact of the pain or other symptoms on the claimant's residual functional capacity to do his previous work or other substantial gainful work that exists in the national economy. SSR 82-58 required a consideration of both subjective and objective factors in making this assessment, including the claimant's allegations concerning the frequency and duration of the pain, precipitating and aggravating factors, the effect on the claimant's daily activities, the effect of

---

[1] We are sending a copy of our petition in *City of New York* to counsel for respondents.

medication, and recorded observations about the pain by examining physicians and SSA personnel. See Pet. App. 10a-14a, 29a-30a, 58a.

2.a. Respondent Lorraine Polaski received disability benefits under Title II of the Social Security Act beginning in 1979 (Pet. App. 33a). Her eligibility subsequently was reviewed, and the state agency determined that her disability had ceased as of June 1982, because she was then able to engage in substantial gainful activity. Polaski was so informed in an initial determination dated July 26, 1982 (P. Tr. 166).[2] That decision was sustained on reconsideration (P. Tr. 169), and an Administrative Law Judge (ALJ) rendered a decision to the same effect after a hearing (P. Tr. 23-30). The ALJ stated that Eighth Circuit precedent permits a finding of disability based on the claimant's subjective complaints of pain if there is no factual basis in the record for rejecting the claimant's testimony (P. Tr. 28). But the ALJ stressed that symptoms, including pain, are insufficient to establish disability unless medical findings or signs show that there is a medical condition that could reasonably be expected to produce those symptoms, and that the mere assertion of pain does not foreclose the ALJ from finding that the claimant's complaints lack credibility to establish an impairment of the requisite severity (*ibid.*). After reviewing the evidence under these principles, the ALJ concluded that "the record does not establish the existence of pain of such intensity and frequency so as to preclude [Polaski] from engaging in all

[2] "P. Tr." refers to the transcript of the administrative record in respondent Polaski's case that was filed by the Secretary in district court pursuant to 42 U.S.C. 405(g). "B. Tr." refers to the transcript in respondent Blaschko's case.

types of competitive work activity" and that Polaski could work in a "relatively low-stress, 'unskilled' work environment" (*ibid.*). The Appeals Council denied review of the ALJ's decision on November 28, 1983 (P. Tr. 6-7).

After thus exhausting her administrative remedies, respondent Polaski filed a civil action on January 20, 1984 in the United States District Court for the District of Minnesota pursuant to 42 U.S.C. 405(g), seeking judicial review of the Secretary's final decision that her disability had ceased. On April 3, 1984, she sought to amend the complaint to represent a class of claimants in the Eighth Circuit. Polaski alleged that the Secretary was "nonacquiescing" in Eighth Circuit case law (i) that addressed the consideration of subjective complaints of pain and (ii) that, in Polaski's view, required the Secretary to find improvement in a recipient's medical condition before terminating his disability benefits (Pet. App. 32a-33a).

b. On April 17, 1984, the district court granted Polaski's motion to amend the complaint, certified an Eighth Circuit-wide class, and entered a Circuit-wide temporary restrainting order (Pet. App. 32a-45a).[3] The class is defined to include all persons re-

---

[3] The district court also granted the motion by respondent Patrick Blaschko to intervene (Pet. App. 34a). Blaschko, like Polaski, was a prior recipient of disability benefits whose benefits were terminated. As in Polaski's case, the ALJ expressly cited Eighth Circuit precedent concerning the evaluation of pain, but concluded on the basis of all of the evidence that Blaschko's pain was not of sufficient severity to preclude him from engaging in substantial gainful activity (B. Tr. 14-16). The Appeals Council denied Blaschko's request for review on January 17, 1983 (B. Tr. 3-4), and he thereafter filed an individual action for judicial review in the United States

siding in the Eighth Circuit who have been or will be notified that their applications for disability benefits have been denied or that their benefits have been terminated; "who allege that they are unable to work in whole or in part because of pain or other subjective complaints and/or that their medical condition has not improved"; and "who are pursuing or will pursue timely administrative or judicial appeals, or, if not pursuing timely appeals, who have received or will receive an adverse decision at any level of the administrative review process on or after January 30, 1984" (Pet. App. 51a-52a). The latter date was selected to comply with the requirement in 42 U.S.C. 405(g) that a claimant seek judicial review within 60 days of the Secretary's final decision on his claim for benefits (Pet. App. 23a-24a n.4).[4]

District Court for the District of Minnesota on March 15, 1983, pursuant to 42 U.S.C. 405(g). *Blaschko* v. *Heckler*, Civil No. 4-83-233. Blaschko's action was assigned to a different judge (Murphy, J.) than the judge who decided the instant case (Lord, C.J.).

By order dated March 7, 1984, the district court remanded Blaschko's individual case to the Secretary for further proceedings in accordance with a magistrate's report dated February 23, 1984, which concluded that the ALJ had incorrectly discredited Blaschko's subjective complaints of pain. Thus, Blaschko's own individual action under 42 U.S.C. 405(g) had already been resolved when the district court permitted him to intervene in the instant case. We have been informed by HHS that, after the remand, the Appeals Council rendered a decision fully favorable to Blaschko on January 12, 1985.

[4] The district court adopted beginning dates other than January 30, 1984 for class members in Arkansas and Iowa, concluding that the running of the 60-day period had been tolled by the filing of separate class actions in those States (Pet. App. 50a & n.1, 51a-52a). See pages II-III, *supra*.

In an order dated April 27, 1984, the district court rejected the Secretary's contention that the class could not include any persons who had not exhausted their administrative remedies, as required by 42 U.S.C. 405(g). The court reasoned that judicial "waiver" of this requirement was appropriate because, in its view, members of the class otherwise would suffer irreparable harm and it would be "futile and inefficient" to require exhaustion (Pet. App. 49a). The court also concluded that it could exercise mandamus jurisdiction under 28 U.S.C. 1361 (*ibid.*).

The district court then entered a sweeping "preliminary injunction" that directed the Secretary: (i) to notify all new-applicant class members who then had administrative appeals pending that they were entitled to have their claims considered under what the court defined as the "proper" pain standard, to submit additional evidence under that standard, to receive an expedited decision within 60 or 90 days, and to receive interim benefits if a decision was not rendered within the applicable time period; (ii) to notify all class members whose applications had been denied and who did *not* have a timely appeal pending that they were entitled to have their claims reopened and readjudicated under the same conditions; and (iii) to reopen the claims of all class members in the latter category whose files were still located at an SSA district office or Appeals Council, whether or not the individual claimant requested reopening (Pet. App. 75a-77a, 80a). The court ordered similar injunctive relief as regards class members whose benefits had been terminated, requiring the Secretary, inter alia, to notify class members that they could have their claims reopened and reconsidered under what the court determined to be the "proper" pain standard and under an appropriate "medical im-

provement" standard for determining when a recipient's disability has ceased (*id.* at 73a-75a, 79a-80a).

3. The Secretary appealed the district court's order entering the preliminary injunction.[5] Because the Secretary argued on appeal that she had been applying standards for the evaluation of pain that were consistent with Eighth Circuit precedent, the court of appeals deferred its decision in order to allow the parties an opportunity to reach agreement on the appropriate standards (Pet. App. 28a). The parties thereafter did reach agreement (*id.* at 29a-30a), and by order dated July 17, 1984 (*id.* at 27a-31a), the court of appeals approved that agreement as a correct restatement of Eighth Circuit precedent on the subject.[6]

4. The court of appeals issued its decision on the remaining issues in the case on December 31, 1984

---

[5] The court of appeals granted a stay pending appeal (Pet. App. 28a).

[6] The agreement stated that symptoms, such as pain, are the individual's own perceptions of the effects of his impairment and that such symptoms must be considered in terms of any restrictions they impose beyond those demonstrated by objective physical manifestations (Pet. App. 29a). The agreement further stated that direct medical evidence of the relationship between the impairment and the degree of a claimant's subjective complaints need not be produced and that the adjudicator may not disregard a claimant's subjective complaints solely because the objective medical evidence does not fully support them (*id.* at 29a-30a). The agreement concluded that the absence of an objective medical basis to support the severity of the complaints alleged is just one factor to be considered in evaluating the credibility of the testimony and complaints, and that the adjudicator must give full consideration to all of the evidence, including the claimant's prior work record, his daily activities, the frequency and intensity of the pain, precipitating and aggravating factors, the effects of medication, and resulting functional restrictions (*id.* at 30a).

(Pet. App. 1a-26a). In the meantime, Congress had enacted the Social Security Disability Benefits Reform Act of 1984 (Pub. L. No. 98-460, 98 Stat. 1794), which had a direct bearing on both the "medical improvement" and "pain" issues.

a. In Section 2 of the 1984 Act (98 Stat. 1794), Congress enacted detailed statutory standards for determining whether a person's disability benefits should be terminated, and it required the cases of individual class members in certified class actions raising the "medical improvement" issue to be remanded to the Secretary for reconsideration under the new standards. The court of appeals concluded that all of the class members in the instant case who previously had been receiving benefits but whose benefits were terminated were covered by the special remand provisions of the 1984 Act, and it therefore remanded the cases of these class members to the Secretary for consideration under Section 2 of the 1984 Act (Pet. App. 5a-10a). This disposition was consistent with this Court's similar remand orders in *Heckler* v. *Lopez*, No. 84-115 (Dec. 10, 1984), and *Heckler* v. *Kuehner*, No. 83-1593 (Nov. 5, 1984).[7] The individual case of respondent Polaski, the class representative, was covered by the remand provisions of the 1984 Act.

b. There remained, then, the question of the proper disposition of the claims of the class members who had not previously been receiving disability benefits

---

[7] As the court of appeals held (Pet. App. 13a), any of these terminated class members are entitled to raise the "pain" issue in the course of the administrative reconsideration of their claims. See the Supplemental Brief (at 9 n.9) filed on behalf of the Secretary on October 23, 1984 in *Heckler* v. *Kuehner, supra.*

and who therefore were not covered by the special remand provisions in Section 2 of the 1984 Act. As to these class members (the new applicants), the instant case raised only the "pain" issue.

In Section 3 of the 1984 Act (98 Stat. 1799 (Pet. App. 87a-89a)), Congress enacted new statutory standards for the consideration of pain. The Secretary argued (Supp. Br. 13-15; Supp. Reply Br. 10-11) that Section 3 of the 1984 Act superseded prior law and that she should be permitted to interpret and apply the new statutory "pain" provisions in the first instance, either by regulation or in the course of the administrative adjudication of claims presenting that issue. Nevertheless, the court of appeals chose to reach the question of the meaning of Section 3 of the 1984 Act and concluded that it did not affect the July 17, 1984 settlement agreement between the parties because, in the court's view, the 1984 Act did not depart from prior law embodied in that agreement (Pet. App. 16a-17a).

The majority, over Judge Gibson's dissent (Pet. App. 25a-26), also rejected the Secretary' contention that the court in any event had no jurisdiction to resolve the "pain" issue because the new-applicant class members had not exhausted their administrative remedies, as required by 42 U.S.C. 405(g) (Pet. App. 18a-25a). Following the Second Circuit's reasoning in *City of New York* v. *Heckler*, 742 F.2d 729 (1984), petition for cert. pending, No. 84-1923 (see Pet. App. 20a, 23a), the court of appeals held that judicial "waiver" of the exhaustion requirement was appropriate under what it termed a "pragmatic analysis" of "the claimants' interest in judicial review at that point in the proceedings" and "the relative harm to the agency's administrative process" (*id.* at 20a).

The court of appeals relied on a number of factors. First, it believed that the class members would suffer "potentially irreparable harm" because a denial of benefits could result in financial hardship and cause them to become anxious, depressed, or despairing (Pet. App. 20a-21a). Second, the court reasoned that deference to the Secretary's judgment that full exhaustion is required was "inappropriate" because respondents contended the administrative adjudicators at every level had evaluated complaints of pain under an improper standard and because the Secretary acknowledged that "some adjudicators" had misinterpreted her policies (*id.* at 21a-22a). Third, the court believed that it would be "unfair" not to require reopening of the claims of class members that had been denied prior to July 17, 1984, because claims considered after that date would be decided under the proper standard embodied in the settlement agreement (*id.* at 22a-23a). Fourth, the court believed that deference to the agency's expertise was "unnecessary and inappropriate" because the parties' stipulation on pain and the 1984 Act had resolved the controversy over the pain standard (*id.* at 23a). Fifth, although the court conceded that the legal issue concerning the evaluation of pain, unlike the issue in *Mathews* v. *Eldridge*, 424 U.S. at 330, was not "wholly collateral" to the class members' claims for benefits, the court believed it was sufficient that the "focus" of the argument on behalf of the class was "substantially" collateral to their claims for benefits (Pet. App. 23a).[8]

[8] The court of appeals directed the Secretary to send a notice to the new-applicant class members informing them of their right to request reopening, but eliminated the district court's requirements that readjudication be accomplished within fixed

c. The Secretary's petition for rehearing en banc on the exhaustion issue was denied, with three judges dissenting (Pet. App. 84a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals dispensing with the exhaustion prerequisite to jurisdiction under 42 U.S.C. 405(g) is flatly inconsistent with this Court's decisions in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); and *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984). The court's ruling on the exhaustion issue also directly conflicts with the decision of the Fourth Circuit in an identical class action challenging the manner in which pain is considered. *Hyatt* v. *Heckler*, 757 F.2d 1455, 1460 (1985). The result of the decision below is to require reopening of administrative decisions throughout the Eighth Circuit that the claimants involved allowed to become final and binding when they failed to seek further administrative review within the 60 days permitted by governing regulations. The Department of Health and Human Services estimates that there are approximately 9,000 such cases. The decision below therefore plainly warrants review by this Court.

The exhaustion issue in this case is similar to that presented in *Heckler* v. *City of New York*, petition for cert. pending, No. 84-1923, in which the Court recently granted a partial stay pending certiorari. No. A-972 (July 1, 1985). Related exhaustion issues also are presented in the Secretary's direct appeal in *Heckler* v. *Owens*, appeal docketed, No. 84-1905

---

deadlines and that the Secretary pay interim benefits to class members whose claims were not readjudicated within this period (Pet. App. 24a-25a).

(June 5, 1985). We do not believe it is necessary for the Court to grant plenary review here as well. Instead, we suggest that the Court hold the petition in this case pending its disposition or decision in *City of New York* and *Owens*. We therefore refer the Court to the discussion of the exhaustion requirement in the certiorari petition (at 16-23) in *City of New York* and add the following observations:

1. In the petition (at 20-22) in *City of New York*, we explain that where, as here, the Secretary has not waived full exhaustion of administrative remedies, the Court has recognized only one exception to the exhaustion requirement. That exception applies where the legal issue the claimant raises is "entirely" or "wholly" collateral to the merits of his substantive claim for benefits and he has advanced a colorable argument that he will suffer irreparable injury if judicial review is not immediately available. *Mathews* v. *Eldridge*, 424 U.S. at 330-332; *Heckler* v. *Ringer*, slip op. 14-15. That lone exception plainly has no application here. The court of appeals conceded that the legal issue respondents raise concerning the evaluation of pain, unlike the asserted right to a pretermination hearing in *Eldridge*, is not "wholly collateral" to the merits of the class members' claims for benefits (Pet. App. 23a); to the contrary, that issue goes to the very heart of their entitlement to benefits under the statutory definition of "disability" and implementing regulations. Nor have respondents identified any distinct and irreparable injury that might result from the Secretary's allegedly erroneous evaluation of pain. They allege only the sorts of hardship any claimant for disability benefits might suffer if his application is denied on the merits at a preliminary stage of the administrative review pro-

cess. That obviously is not a basis for dispensing with the "final decision" requirement in 42 U.S.C. 405(g). Indeed, the single class representative, respondent Polaski, *did* exhaust her administrative remedies and obtain the requisite final decision of the Secretary before seeking judicial review. See also note 3, *supra*. There is no reason why the unnamed class members should be excused from doing the same.

2. The error of the court of appeals in the instant case is, in one respect, more egregious than that of the Second Circuit in *City of New York*. The court below *endorsed* the Secretary's overall approach to the evaluation of complaints of pain, as reflected in the settlement agreement the court approved on July 17, 1984. As a result, there was no reason to assume that a significant percentage of disability claims based on allegations of pain had been decided incorrectly; rather, there were, at most, only occasional misapplications of the Secretary's concededly proper approach in an unspecified number of administrative decisions affecting particular individual claimants. Such isolated errors are precisely the sort that should be left to correction by the Secretary in further administrative proceedings on the particular claims involved. *Salfi*, 422 U.S. at 765-766; *Ringer*, slip op. 14-16. Yet the court of appeals has required the Secretary to provide for the readjudication of *all* administrative decisions in the Eighth Circuit during the relevant time period in which the applicant alleged disabling pain and the application was denied on medical or medical vocational grounds (Pet. App. 51a).

3. Another objectionable result of the erroneous exhaustion holding in this case is that the court of appeals proceeded to render a decision regarding the

interpretation of a statutory provision—Section 3 of the 1984 Disability Benefits Reform Act—before the Secretary even was given an opportunity to interpret and apply that statutory provision in the first instance, either by regulation or by the administrative adjudication of particular claims for benefits in which the pain issue was raised. If the court below had respected the controlling precedents of this Court on the exhaustion issue, it instead would have remanded the case to the district court with instructions to dismiss for lack of jurisdiction as regards the new-applicant class members, without reaching the legal issue concerning the evaluation of pain.[9] The correct interpretation of the newly enacted statutory provision then could have been resolved at a later date on judicial review under 42 U.S.C. 405(g) of the Secretary's "final decision" denying a class member's claim for benefits, if the pain issue ultimately proved to have any bearing on the Secretary's resolution of that claim.

---

[9] The court of appeals could not have resolved that issue in the context of the claims of the two named respondents, since Blaschko's individual case already had been remanded and Polaski's case was required to be remanded under Section 2 of the 1984 Act without reaching the merits of the pain issue. See note 7, *supra*; *Heckler* v. *Kuehner*, *supra*. The court of appeals acknowledged that the unnamed members of the class had not exhausted their administrative remedies (Pet. App. 19a).

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of the Court's disposition in *Heckler* v. *City of New York*, No. 84-1923, and *Heckler* v. *Owens*, No. 84-1905. If the Court grants the petition for a writ of certiorari in this case and remands for further consideration in light of those cases, it should vacate the judgment below except insofar as it addresses the cases of the terminated class members under Section 2 of the Social Security Disability Benefits Reform Act of 1984.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

WILLIAM KANTER
HOWARD S. SCHER
Attorneys

JULY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10250